Capping Corp Ltd & Ors v Aquawalk Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–948 OF 2009
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
17 MARCH 2013

Contract — Intention — Settlement agreement — Whether parties to main agreement intended to abandon rights under agreement when they executed subsequent agreements to settle disputes — Whether settlement agreements superseded and terminated effect of main agreement — Whether intention expressed in settlement agreements

The first appellant ('A1) and the fourth respondent ('R4') incorporated the first respondent ('R1') to carry out a joint-venture project. The relationship between A1 and R4 in the joint-venture project was governed by a shareholders' agreement ('SA') which contained an arbitration clause. Following an increase in the share capital of R1, the second and third appellants ('A2' and 'A3') and the second respondent ('R2') were among R1's new shareholders. Disputes between A1, A2 and A3 on the one hand and R4 on the other, led to litigation between the parties which was finally resolved by the respective parties entering into two settlement agreements and a settlement memorandum ('the settlement agreements'). Subsequent to that, when R2 and R4 transferred the bulk of their shares in R1 to the third respondent, the appellants viewed that exercise as being in breach of cll 11 and 12 of the SA and, pursuant to the arbitration clause in the SA, issued notice that it intended to commence arbitration proceedings against the respondents. The respondents applied to the High Court to prevent the appellants from commencing the arbitration proceedings. The High Court granted the application holding that with the execution of the settlement agreements the parties had abandoned their rights under the SA including the right to commence arbitration proceedings. The appellants appealed against that decision to the Court of Appeal.

Held, allowing the appeal:

(1) There was no evidence to show the appellants had waived or abandoned their rights under the SA which continued to subsist and remain binding on the contracting parties. The parties could have easily stated that the SA had been terminated by the execution of the settlement agreements. The fact that there was no such provision in the settlement agreements spoke for itself (see paras 22–24).

(2) The High Court had misconstrued the settlement agreements and

inferred that they had superseded the SA; that the SA had lapsed and ceased to have effect and that the parties had waived or abandoned their rights thereunder. Where there was a written agreement, any variation or termination of the same should also be in written form and in very clear language. There was no mention in the settlement agreements that the SA had been superseded or terminated. Those agreements concentrated solely on resolving the then pending litigation between the parties (see paras 17–18, 20–22).

(3) As there existed a dispute between the parties as to whether the respondents had complied with cls 11 and 12 of the SA, and in view of the existence of the arbitration clause in the SA, the arbitration notice was issued properly (see para 26).

[Bahasa Malaysia summary

Perayu pertama ('A1) dan responden keempat ('R4') menubuhkan responden pertama ('R1') untuk menjalankan projek usaha sama. Hubungan antara A1 dan R4 di dalam projek usaha sama dikawal oleh perjanjian pemegang-pemegang saham ('SA') yang mengandungi klausa timbang tara. Berikutan penambahan dalam modal saham R1, perayu-perayu kedua dan ketiga ('A2' dan 'A3') responden kedua ('R2') adalah antara pemgang-pemegang saham baru R1. Pertikaian antara A1, A2 dan A3 di satu pihak dan R4 di pihak satu lagi, membawa kepada litigasi antara pihak-pihak yang akhirnya diselesaikan oleh pihak masing-masing dengan memasuki dua perjanjian penyelesaian dan memorandum penyelesaian ('perjanjian penyelesaian'). Selepas itu, apabila R2 dan R4 memindahkan sebahagian besar daripada saham-saham mereka dalam R1 kepada responden ketiga, perayu-perayu berpandangan bahawa pelaksanaan tersebut sebagai kemungkiran klausa-klausa 11 dan 12 SA dan, berikutan klausa timbang tara di dalam SA, mengeluarkan notis yang ia berniat untuk memulakan prosiding timbang tara terhadap responden-responden. Responden-responden memohon kepada Mahkamah Tinggi untuk menghalang perayu-perayu daripada memulakan prosiding timbang tara. Mahkamah Tinggi membenarkan permohonan tersebut dengan memutuskan bahawa dengan pelaksanaan perjanjian penyelesaian pihak-pihak telah membatalkan hak mereka di bawah SA termasuk hak untuk memulakan prosiding timbang tara. Perayu-perayu merayu terhadap keputusan Mahkamah Rayuan.

Diputuskan, membenarkan rayuan:

(1) Tidak terdapat keterangan untuk menunjukkan perayu-perayu telah mengetepikan atau membatalkan hak mereka di bawah SA yang mana terus wujud dan kekal mengikat ke atas pihak-pihak dalam kontrak. Pihak-pihak boleh dengan mudahnya menyatakan bahawa SA telah ditamatkan oleh pelaksanaan perjanjian penyelesaian. Fakta bahawa

tidak terdapat peruntukan sedemikian di dalam perjanjian penyelesaian tidak perlu penjelasan (lihat perenggan 22–24).

(2) Mahkamah Tinggi telah menyalahtafsirkan perjanjian penyelesaian dan menyatakan yang ianya telah menggantikan SA tersebut; bahawa SA telah luput dan tamat untuk berkesan dan bahawa pihak-pihak telah mengetepikan atau membatalkan hak mereka di bawahnya. Di mana terdapat perjanjian bertulis, apa-apa variasi atau penamatannya patut juga dalam bentuk bertulis dan dalam bahasa yang amat jelas. Tidak terdapat sebutan di dalam perjanjian penyelesaian bahawa SA telah diganti atau ditamatkan. Perjanjian-perjanjian tersebut bertumpu semata-mata ke atas menyelesaikan litigasi yang masih belum didengar antara kedua-dua pihak (lihat perenggan 17–18, 20–22).

(3) Memandangkan wujud pertikaian antara pihak-pihak terhadap sama ada responden-responden telah mematuhi klausa-klausa 11 dan 12 SA, dan mengambil kira kewujudan klausa timbang tara di dalam SA, notis timbang tara dikeluarkan secara betul (lihat perenggan 26).]

Cases referred to

Central Bank of India v Hartford Fire Insurance Co Ltd AIR 1965 SC 1288, SC (refd)

Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; [1994] 2 BLJ 201, SC (folld)

Legislation referred to

Arbitration Act 2005 s 18, 18(1)

Appeal from: Originating Summons No D2–24–446 of 2006 (High Court, Kuala Lumpur)

Celine Chelladurai (Sabarina bt Samadi, Yogarajah Kanaga Rajah and Tan Boon Han with her) (Zaid Ibrahim & Co) for the appellant.

Oh Choong Chee (Valen, Oh & Partners for the first respondent.

Sanjeev Kumar (Sanjeev Kumar) for the second respondent.

Ebenezer Ramesh (Navaratnam Chambers) and Vijay Rueben (Kadir, Andri & Partners) for the third and fourth respondents.

David Wong JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge held that the appellants are not entitled to initiate arbitration proceeding under cl 17.1 of the shareholders agreement dated 11 October 2002 entered between the first appellant and the fourth respondent

(shareholders agreement). The decision stems from an application by the respondents in the form of an originating summons.

[2] On 7 March 2013 we heard the appeal and after due consideration by us, we allowed the appeal for reasons set out below.

BACKGROUND FACTS

[3] The first appellant and the fourth respondent on 31 October 2001 incorporated Aquawalk Sdn Bhd as the original shareholders of one share each with a view of implementing a joint venture investment plan of owning and operating an Aqua-Marine Discovery Centre in Kuala Lumpur.

[4] The relationship between the first appellant and the fourth respondent in the joint venture investment is governed by and encapsulated in the shareholders agreement.

[5] At that time, the shareholding of the first appellant and fourth respondent were respectively 50,000 shares each. By two separate supplemental shareholders agreements dated 24 June 2003 and 24 October 2003 respectively, the authorised and issued share capital of the first respondent was increased from 100,000 ordinary shares to 50,000,000 ordinary shares of RM1 each.

[6] After the increase of the authorised and issued capital in the first respondent, the registered shareholders of the first respondent on or about the end of 2004 were as follows:

Name	Number of shares
Capping Corp (2003) Ltd (the second appellant)	2,400,000
Waiata Holdings (AKL) Ltd (the third appellant)	800,000
Aquawalk International Ltd (the fourth respondent)	16,320,000
Mace Consulting Ltd	1,600,000
Alistair Ian Thomson	800,000
Sarah Frances Thomson	800,000

Vista Aspen Sdn Bhd	1,600,000
Sundry Investments Malaysia Ltd	3,200,000
Marinescape Thailand Ltd	480,000
TBS Franchise Sdn Bhd (the second respondent)	4,000,000

[7] However, disputes arose between the first, second, third appellants and the fourth respondent which culminated in the following legal suits:

(a) the first, second, third appellants on 2 December 2004 initiated legal proceeding against the fourth respondent and nine others on the ground that they had been oppressed as minority shareholders in the first respondent; and

(b) the fourth respondent also initiated legal proceeding against the first and second appellants in the New Zealand Courts. This suit was founded on the following contentions:

(i) that the shares held by the fourth respondent in the first respondent are on trust for and on behalf of Philip Mark Bell-Booth who is the principal of the first appellant; and

(ii) that the proceeds of the sale of shares in the first respondent by the fourth respondent are to be divided between Bell-Booth and one Terence O'Boyle, who is the principal of the fourth respondent.

[8] The New Zealand Court on 25 June 2005 dismissed the fourth respondent's suit. The learned judge there held that the proper forum to adjudicate the disputes between the parties is by way of arbitration in Malaysia premised on the existence of an arbitration clause (cl 17.1) in the shareholders agreement.

[9] Pursuant to the New Zealand Court's ruling, the first, second and third appellants initiated arbitration against the fourth respondent by way of a notice of arbitration dated 4 July 2005 (2005 notification), which concerns, among others, the following disputes:

(a) the fourth respondent's denial that it was holding shares on trust for the first to third appellants;

(b) breaches of the shareholders agreement by the fourth respondent; and

(c) the fourth respondent's threat to use the voting powers attached to the shares held on trust for the first to third appellants for its own purpose and gains.

[10] In response to the 2005 notification, the fourth respondent took out an originating summons dated 25 November 2005 against the first, second and third appellant to restrain them from initiating arbitration proceeding on the following grounds:

(a) that the first appellant having disposed off of its shares on 15 December 2003 is no longer a shareholder in the first respondent and hence ceases to have any rights in the shareholders agreement; and

(b) that the second and third appellant are not parties to the shareholders agreement, hence cannot derive any rights under the shareholders agreement to seek arbitration proceeding under cl 17.1.

[11] The aforesaid disputes were settled by the respective parties by two settlement agreements dated 27 February 2006 and 24 March 2006, respectively which were reduced to a settlement memorandum dated 6 April 2006 which is exhibited at pp 550–553, Vol 4 of the records of appeal.

[12] The upshot of the settlement memorandum was that the arbitration proceedings pursuant to the 2005 notification, the minority oppression proceedings and the fourth respondent's originating summons dated 25 November 2005 were discontinued together with provision for certain transfer of shares among the parties which was implemented by the respective parties.

[13] Sometime around August and October 2006, the appellants became aware of the fact that the fourth respondent had transferred 11,780,000 units of shares in the first respondent to a third party, namely the thirrd respondent. Additionally, the second respondent had similarly transferred 4,000,000 units of shares in the first respondent to the third respondent.

[14] The appellants held the view the transfers by the respondents as mentioned in para 13 had contravened the shareholders agreement in that they failed to comply with cll 11–12. This resulted in another notice of arbitration issued on 13 November 2006 (2006 notification) by the appellants.

[15] The 2006 notification was rejected by the respondents resulting in this originating summons dated 5 December 2006 (later amended on 8 January 2007) against the appellants for amongst others an order that the appellants be

restrained from initiating arbitration proceeding against the respondents.

THE HIGH COURT DECISION

[16] The learned judge sustained the respondents' originating summons by way of two orders dated 27 April 2009.

In respect of the first plaintiff (the first respondent) the order reads as follows:

(a) that all rights under the shareholders agreement including the right (if any) to commence an arbitration under cl 17.1 of the shareholders agreement have in any event been waived or abandoned and that the only continuing obligations between the defendants (the appellants) and the first plaintiff (the first respondent) are as described in the settlement agreements dated 27 February 2006 and 24 March 2006 and the settlement memorandum dated 6 April 2006;

(b) that the first defendant (the first appellant) having on 15 December 2003 disposed of all its shares in the first plaintiff (the first respondent) held by it and thereafter having ceased to own or hold any shares of the first plaintiff (the first respondent here), has ceased to have any rights and obligations under the shareholders agreement dated 11 October 2002 (the shareholders agreement), between Aquawalk International Ltd, Capping Corp Ltd and Aquawalk Sdn Bhd;

(c) that the second, third, and fourth defendants (the second to fourth appellants), not being parties to the shareholders agreement dated 11 October 2002 (the shareholders agreement) are not entitled to any rights or benefits arising therefrom;

(d) that the second, third and fourth defendants (the second to fourth appellants) not being parties to the said shareholders agreement are not entitled to initiate, proceed or participate in any arbitration pursuant to cl 17.1 of the shareholders agreement; and

(e) that the first to the fourth defendants (the first to fourth appellants) are by conduct estopped from relying on any provision in the shareholders agreement including but not limited to cl 17.1 of the shareholders agreement.

In respect of the second and third plaintiffs (the second and third respondent) the order reads as follows:

(a) that the first to the fourth defendants (the first to fourth appellants) are not entitled to initiate and/or proceed with any arbitration proceedings pursuant to cl 17.1 of the shareholders agreement dated 11 October 2002 against the second and third plaintiffs (the second and third respondents); and

(b) that the first and fourth defendants (the first to fourth appellants) are restrained from initiating and/or proceeding and/or participating in any arbitration proceedings as provided under cl 17.1 of the shareholders agreement dated 11 October 2002 against the second and third plaintiffs (the second and third respondents).

GROUNDS OF DECISION

[17] Learned counsel for the appellants lists nine grounds of appeal but this appeal in our view can be disposed of by dealing with the first two grounds of appeal which relate to the learned judge's finding that the shareholders agreement has lapsed or ceased and that the parties had waived or abandoned any rights under the shareholders agreement.

[18] With respect to the learned judge, we agree with the submission of the appellants that he had misconstrued the two settlement agreements and settlement memorandum (collectively referred to as the three settlement agreements) and our reasons are these.

[19] The basic legal principle of interpretation of any written document is as stated by the Supreme Court of India in *Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288 and it is this:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[20] We now apply that basic principle of construction to the three settlement agreements. The existence of cl 17.1 in the shareholders agreement is not disputed and what the learned judge did here was that he had inferred from the three settlement agreements had superseded the shareholders agreement. It is our view when there is a written agreement, any variation or termination of the same should be also in written form and in very clear language.

[21] Can that be said of the three settlement agreements in this appeal? Our answer is an emphatic 'no' for the simple reason that there is no mention in the three settlement agreements that the shareholders agreement has been superseded or terminated by the three settlement agreements.

[22] In fact on the contrary, if one looks at the memorandum agreement and the manner it was structured, it is obvious that the parties were concentrated solely on resolving the then pending litigations between the parties. Paragraph A in fact states 'Terms and Order of all litigation settlement'. It also specifically mentions the four pending litigations which are as follows:

(a) Malaysian Arbitration settlement;

(b) Malaysia Oppression Petition Settlement;

(c) Malaysia Injunction Application settlement; and

(d) NZ Injunction (BNZ fund) settlement — release of BNZ held Fund and Interest.

Further it is not insignificant that there is no mention in any form or nature of the shareholders agreement in the three settlement agreements. We further find that there is no evidence to show that the conducts of the appellant had waived or abandoned their rights under the shareholders agreement.

[23] In any event, if that were the intention of the parties, we say that this could have been easily achieved by stating that the shareholders agreement has been terminated by the execution of the three settlement agreements. The fact that there is no provision in the three settlement agreements speaks for itself.

[24] Accordingly we hold that the shareholders agreement continue to subsist and remain binding on the contracting parties. With that we now look at the 2006 notification issued pursuant to cl 17.1 of the shareholders agreement which reads as follows:

> Arbitration:
>
> 17.1 In the case of dispute between the parties hereto, the dispute shall be submitted to arbitration which shall be construed by the Kuala Lumpur Regional Center for Arbitration with the venue at Kuala Lumpur and such arbitration shall be settled/determined in accordance with the UNCITRAL (United Nations Commission of International Trade Law Arbitration) Rules. The language used in such arbitration proceedings shall be in the English language.

[25] The reliefs sought in the 2006 notification are these:

(a) a declaration or determination that the first and second respondents are obliged in respect of any transfers of the shares of the first respondent in the second respondent to third parties including the third and fourth respondents to observe and fulfill the said provisions of the said cll 11–12 of the said shareholders agreement;

(b) a declaration that the first claimant is entitled to appoint a second director of the second respondent pursuant to the said cl 4.4 of the said shareholders agreement;

(c) a determination that the first respondent shall forthwith withdraw the appointment as a director of the second respondent of either one David Mace or one (Simon) Foong Choong Heng as the first respondent shall elect;

(d) a determination that the maximum number of directors of the second respondent shall be six in accordance with the said cl 4.1 of the said shareholders agreement and that those persons appointed directors in addition to the six persons originally appointed as such procured by the first and third and fourth respondents and with the cooperation of the second respondent shall not be directors of the second respondent; and

(e) directions restraining the first, second, third and fourth respondents and each of them from committing further breaches of the shareholders agreement.

[26] Having read the documents contained in the record of appeal, we have no doubt that there exists disputes between the parties as to whether the respondents had complied with cll 11–12 of the shareholders agreement for the transfers of shares which occurred after the three settlement agreements. Hence in view of the existence of cl 17.1, we find that the 2006 notification was issued properly.

[27] The arbitration regime is now governed by Arbitration Act 2005 which in our view dictates that the courts take a minimal interference approach and this is reflected in s 18 of the Arbitration Act 2005 which gives the arbitrator the power to rule on his own jurisdiction.

This power was not present in the 1952 Arbitration Act. Section 18 reads as follows:

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.

(2) For the purposes of subsection (1) —

(a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not ipso jure entail the invalidity of the arbitration clause.

(3) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5), either as a preliminary question or in an award on the merits.

(8) Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) No appeal shall lie against the decision of the High Court under subsection (8).

[28] Learned authors in the book — *The Arbitration Act 2005 — Uncitral Model Law as applied in Malaysia* — at p 87 in respect of s 18(1) states as follows:

18.6 Section 18(1) provides for the doctrine of 'Kompetenz-Kompetenz' which is taken from German terminology. The doctrine has two aspects. Firstly, it confirms to the arbitrators that they may decide on their jurisdiction without need for support from the Court. Secondly, it discourages the Court from determining the issue before the arbitral tribunal has decided it. The Court itself when seized prematurely with the issue of the arbitrator's jurisdiction would confine itself to find that an arbitration agreement exists and to refer the parties to arbitration. In effect, the doctrine reduces the ability of one party to delay the proceedings by taking the matter to Court and claiming want of jurisdiction.

[29] Applying that spirit of minimal interference by the courts on matters relating disputes agreed to be resolved by arbitration, we make no further rulings on any of the other issues raised by the respective counsel in this appeal or the High Court. Those issues ought to be adjudicated by an arbitrator or arbitrators.

[30] For completeness, in respect of the submission by learned counsel for the second and third respondent that the appellants had submitted to jurisdiction of the High Court by filing affidavits to oppose the respondents'

originating summons, we find with respect no merit and relies on the rationale set out by the Supreme Court in *Seloga Jaya Sdn Bhd v Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 BLJ 201 where it was held:

> The view adopted by the judge that the filing of the affidavits by the appellant seeking discharge of the interlocutory injunction and the taking of the preliminary objection before Anuar J constituted 'a step in the proceedings' is untenable. Resisting an application for an interlocutory injunction by putting in evidence and appearing in court in the circumstances of this case cannot be taken as 'a step in the proceedings'. The conduct of the appellant did not in any way indicate an election to abandon its right to a stay and nor did it have the effect of invoking the jurisdiction of the court. The appellant had thus not taken a step in the proceedings.

CONCLUSION

[31] For reasons stated above, we allow the appeal, set aside the decision of the High Court, dismiss the amended originating summons with costs in the sum of RM10,000 for each set of respondent to the appellants (here and below) and order all deposits be refunded to the appellants.

Appeal allowed.

Reported by Ashok Kumar